

THE HON. RONALD B. LEIGHTON

UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

**CHINOOK INDIAN NATION**, an Indian Tribe  
and as successor-in-interest to The Lower  
Band of Chinook Indians; **ANTHONY A.  
JOHNSON**, individually and in his capacity as  
Chairman of the Chinook Indian Nation; and  
**CONFEDERATED LOWER CHINOOK TRIBES  
AND BANDS**, a Washington nonprofit  
corporation,

Plaintiffs,

v.

**DAVID BERNHARDT**, in his capacity as  
Secretary of the U.S. Department of Interior;  
**U.S. DEPARTMENT OF INTERIOR; BUREAU  
OF INDIAN AFFAIRS, OFFICE OF FEDERAL  
ACKNOWLEDGMENT; UNITED STATES OF  
AMERICA**; and **TARA KATUK MAC LEAN  
SWEENEY**, in her capacity as Acting Assistant  
Secretary – Indian Affairs,

Defendants.

Case No. 3:17-cv-05668-RBL

**DECLARATION OF THANE W. TIENSON  
IN OPPOSITION TO DEFENDANTS'  
MOTION TO STRIKE PLAINTIFFS'  
UNAUTHORIZED SUR-REPLY**

**I, THANE W. TIENSON**, under penalty of perjury do declare and say:

1. I am the co-counsel for the Plaintiffs in the above-captioned matter and I make  
this declaration in Opposition to Defendants' Motion to Strike Plaintiffs' Unauthorized Sur-  
Reply.

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2. I have been a practicing licensed attorney for more than 42 years and during that long period, I have been counsel for Plaintiffs in which claims for violation of the Administrative Procedure Act (APA) have been asserted against federal agencies on many occasions. I have never bothered to count the number of cases in which I have been co-counsel for plaintiffs in APA claims, but I would estimate that number to be at least 25 cases and perhaps as many as 40. In my experience, all APA cases are decided upon cross-motions for summary judgment. And, as LCR 7(k) suggests, my experience is that all counsel, including DOJ counsel, confer either by e-mail and/or by telephone and try to agree on a briefing schedule for filing of cross-motions for summary judgment.

3. In my experience, it is not uncommon for briefing on cross-motions for summary judgment be contemporaneous.

4. I have not had any prior experience with Mr. Kipnis, counsel for Defendants, other than in this case and I have tried to be courteous, cooperative, responsive and certainly ethical in all my dealings with him.

5. I was surprised to find that Mr. Kipnis, on behalf of the Defendants, filed a motion for partial summary judgment on the Plaintiffs' re-petitioning claims without any prior effort to confer with me or my co-counsel James Coon, especially since the Administrative Record had not yet been settled. Frankly, in my experience, it was unprecedented.

6. Defendants' summary judgment motion was also filed at a busy time for me as I was involved as co-counsel for plaintiff in another APA case in the Western District of Washington against the federal government in which cross-motions for summary judgment were filed under a mutually agreed upon briefing schedule. *"The Coalition to Protect Puget Sound Habitat v. U.S. Army Corp. of Engineers, et al.,* Case No. 2:16-cv-00950-RSL. At the time of Defendants' filing (September 12, 2019), the parties in that case were preparing for a September 17 oral argument on the cross-motions. Supplemental briefing was due by

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1 September 27. And then, following issuance of the Court's Order granting summary  
 2 judgment to the Plaintiffs on October 1, 2019, the Court ordered additional briefing  
 3 regarding appropriate relief to be filed by October 30. While I have co-counsel in that case  
 4 as I do here, the briefing was time-consuming.

5 7. At the same time, I was devoting time to my 96 year old mother, in Astoria,  
 6 Oregon who sustained a hip fracture and underwent surgery in late September. I am her  
 7 legal guardian and have power of attorney for her as well. I also have other work demands  
 8 with which to contend. To that end, I emailed Mr. Kipnis and explained my situation and  
 9 asked for and received an extension of time to respond to his motion. I notified him of my  
 10 intent to file a cross-motion and I also explained that I was doubly surprised by the filing  
 11 because the Administrative Record had not yet been settled. I told him I thought it was  
 12 appropriate to get that issue resolved before summary judgment briefing occurred.

13 8. Mr. Kipnis and I exchanged numerous emails over the next several weeks  
 14 pertaining to the summary judgment briefing and the Administrative Record and my intent  
 15 to file a cross-motion for summary judgment. I also telephoned Mr. Kipnis on two occasions  
 16 that I recall.

17 9. My telephone communication with Mr. Kipnis led me to conclude that in filing  
 18 the summary judgment motion first without prior notice to me Defendants hoped to obtain  
 19 a ruling on their motion before any cross-motion by Plaintiffs could be considered. Mr.  
 20 Kipnis' November 15, 2019 e-mail states that as well. I was concerned because I wanted to  
 21 have an opportunity for my clients, the Chinook Indian Nation, to obtain a summary  
 22 judgment ruling in their favor on our re-petitioning claims. To do that, I needed to file a  
 23 cross-motion for summary judgment.

24 10. I am personally unfamiliar with and did not consider Fed.R.Civ.P. 56(f)(1)  
 25 which, as I read it, allows the court to grant summary judgment to a non-moving party under  
 26 certain circumstances. This was a new Rule just adopted in 2010. I have never heard of it

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1 being invoked by a court and I would not have relied upon it to forego filing a cross-motion  
2 for summary judgment in any event.

3 11. After reading Defendants' initial brief, and drafting my opposition brief, I  
4 concluded that I could include a cross-motion in my opposition brief in order to ensure that  
5 my clients were not prejudiced by not having the ability to file a separate cross-motion for  
6 the court to consider before the court ruled upon Defendant's motion. I informed  
7 Defendant's counsel of my intentions both by phone and email. I then filed a combined  
8 memorandum in opposition and cross-motion for partial summary judgment. I was  
9 concerned though that the Administrative Record had not yet been settled because there  
10 were numerous documents which Plaintiffs were relying upon which had not been formally  
11 made part of the Administrative Record. I informed Mr. Kipnis of my concerns about that  
12 too.

13 12. True copies of all of the e-mail exchanges between me and Mr. Kipnis  
14 concerning summary judgment briefing and the AR are attached hereto and marked as  
15 Exhibit "A". As the court will see from the attached email traffic on September 23, 2019,  
16 11:29AM I asked Mr. Kipnis to agree that Plaintiffs could file an enlarged brief and include a  
17 cross-motion for summary judgment claim regarding the trust fund claims as well. Mr.  
18 Kipnis responded shortly thereafter that same day at 11:56AM objecting to including a cross-  
19 motion regarding the trust fund claims, and he stated he was "... envisioning cross-motions  
20 limited to the causes of action that Defendants motion puts before the court, and those  
21 concern only the legality of the re-petition regulation, which is an entirely separate issue  
22 from the trust fund issue."

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1           13. I understood from Mr. Kipnis' response that he understood and agreed that I  
 2 would be filing a cross-motion on the re-petitioning claim only; that I would be limited to 24  
 3 pages of briefing, but that I would be filing a cross-motion in conjunction with the filing of  
 4 my opposition brief and that Plaintiffs would file a separate cross-motion on the trust funds  
 5 issue at a later date. *See* my email of September 25, 2019 at 11:45AM.

6           14. Consequently, I was surprised when I read Defendants' Reply brief and saw  
 7 that Defendants objected to my inclusion of a cross-motion for summary judgment in my  
 8 opposition brief. However, after reading his Reply brief and researching it, I concluded that  
 9 Mr. Kipnis was correct; that it had not been properly noted and was therefore procedurally  
 10 improper. In fact, Mr. Kipnis has devoted several pages in his motion to strike trying to prove  
 11 that Plaintiffs initially failed to file a proper cross-motion. I sought to remedy the deficiency  
 12 by filing a separate cross-motion for summary judgment. I viewed it as the only possible  
 13 means to allow Plaintiffs an opportunity to prevail upon their re-petitioning claims.  
 14 Understandably, when I drafted that separate cross-motion, I read, considered and felt  
 15 obligated to respond to the arguments that Defendants had provided in their Reply motion.  
 16 However, in doing so, my intent was not to file an unauthorized sur-reply, but to file a  
 17 procedurally proper cross-motion to allow the court to consider Plaintiffs arguments as to  
 18 why they should prevail on their re-petitioning claims.

19           15. I understood that Defendants intended to supplement the AR. Our e-mail  
 20 communications reflect that fact. However, the Administrative Record was not  
 21 supplemented by Defendants until November 5, 2019 (*see* Dkt. #100), four days after  
 22 Defendants filed their Reply.

23           16. As a practical matter, I then wanted to wait until the Administrative Record  
 24 had been settled and I had an opportunity to review those additional documents and  
 25 consider them to determine if any of them were relevant to my cross-motion. I relied upon  
 26 them in part in my cross-motion for summary judgment.

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DATED: December 18, 2019.

Thane W. Tienson

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